

NO. **83-181**

IN THE

SUPREME COURT OF THE UNITED STATES

Office - Supreme Court, U.S.
FILED
JUL 7 1983
ALEXANDER L. STEVAS,
CLERK

OCTOBER TERM 1983

BALDWIN COUNTY WELCOME CENTER,

Petitioner

vs.

CELINDA BROWN,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES A. GRADDICK
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DATE: July 6, 1983

QUESTIONS PRESENTED

Should the 90 day statute of limitations relative to the filing of a complaint in federal court respecting a Title VII claim, 42 U.S.C. §2000e-5(f) (1), and Federal Rules of Civil Procedure, Rule 8, be interpreted with such generosity as to allow the bare submission to the district court clerk of a "right to sue" letter which was issued at the request of the claimant, with no notice to or service upon the employer, to operate as "... a civil action brought against the respondent named in the charge. . ." where no complaint as contemplated by Rule 8 is filed until well after the 90 days specified in the statute have expired?

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
A. STATEMENT OF THE COURSE OF PROCEEDINGS BELOW AND DIS- POSITION OF THE CASE BELOW	4
B. FACTS	5
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	8
APPENDIX	10
A. Opinion and Judgement of the Court of Appeals	10
B. Opinion and Judgement of the District Court	13
CERTIFICATE OF SERVICE	18

CITATION OF AUTHORITY

CASES	Pages
<i>Alexander v. Gardner Denver Co.</i> , 466 F. 2d 1209, reversed on other grounds, 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011, 1011, on remand aff'd, C.A. 10 Colorado, 519 F. 2d 503, certiorari denied, 423 U.S. 1058, 46 L. Ed. 2d 648, 96 S. Ct. 793 (1972 C.A. 10 Colorado)	7-9
<i>Chappell v. Emco Machine Works Co.</i> 601, F. 2d 1295 (5th Cir. 1959)	9
<i>Electrical Workers v. Robbins and Myers, Inc.</i> , 429 U.S. 229, 50 L. Ed. 2d 427, 97 S. Ct. 441 (1976)	8
<i>Genevose v. Shell Oil Co.</i> , 488 F. 2d 84 (1975 C.A. 5 La.)	7
<i>Harris v. National Tea Co.</i> , 454 F. 2d 307 (1971 C.A. 7 Ill.)	7
<i>Harris v. Walgreen Distributors</i> , 456 F. 2d 588 (1972 C.A. 6 Tenn.)	7
<i>Hinton v. CPC International, Inc.</i> , 520 F. 2d 1312 (1975 C.A. 8 Missouri)	7
<i>Houston v. General Motors Corp.</i> , 477 F. 2d 1003 (1973 C.A. 8 Missouri)	7

<i>Love v. The Pullman Co.</i> , 404 U.S. 522, 30 L. Ed. 2d 679, 92 S. Ct. 616 (1972)	8
<i>Mohasco Corp. v. Silver</i> , 447 U.S. 807, 65 L. Ed. 2d 532, 100 S. Ct. 2486 ..	7
<i>Nilsen v. City of Moss Point</i> , 621 F. 2d 117 (1980 5th Cir. Mississippi)	7
<i>Wrenn v. American Cast Iron Pipe Co.</i> , 575 F. 2d 544 (5th Cir. 1978)	7
<i>Wong v. The Bon Marche</i> , 508 F. 2d 1249 (1975, C.A. 9 Wash.)	7
<i>Zipes v. Transworld Airlines</i> , 455 U.S. 385, 71 L. Ed. 2d 234, 102 S. Ct. 1127, reh. den. (U.S.) 72 L. Ed. 2d 461	8
STATUTES	
28 U.S.C. §1254(1)	2
42 U.S.C. §2000e-5(f) (1)	<i>passim</i>
Fed. Rules of Civil Procedure, Rule 8	2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

NO. _____

BALDWIN COUNTY WELCOME CENTER¹,
Petitioner

vs.

CELINDA BROWN,
Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Your petitioner, the Baldwin County Welcome Center¹, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on January 31, 1983, rehearing denied April 8, 1983.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, not reported, appears in the Appendix hereto as Appendix A. The opinion of the District Court for the Southern District of Alabama, also not reported, and as amended, appears in Appendix B hereto.

¹Baldwin County Welcome Center is an administrative subdivision of the Alabama Bureau of Publicity and Information, an agency of the State of Alabama, the actual party in interest.

JURISDICTION

The judgement of the Court of Appeals for the Eleventh circuit was entered on January 31, 1983. A timely petition for rehearing *en banc* was denied on April 8, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Should the 90 day statute of limitations relative to the filing of a complaint in federal court respecting a Title VII claim, 42 U.S.C. §2000e-5(f) (1), and Federal Rules of Civil Procedure, Rule 8, be interpreted with such generosity as to allow the bare submission to the district court clerk of a "right to sue" letter which was issued at the request of the claimant, with no notice to or service upon the employer, to operate as "... a civil action brought against the respondent named in the charge. . ." where no complaint as contemplated by Rule 8 is filed until well after the 90 days specified in the statute have expired?

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §2000e-5(f) (1):

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a

respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, *shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge* (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or

the Attorney General in a case involving a government, government agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of the Commission to obtain voluntary compliance. (emphasis supplied)

STATEMENT OF THE CASE

A. STATEMENT OF THE COURSE OF PROCEEDINGS BELOW AND DISPOSITION OF THE CASE BELOW

This matter was initiated by the receipt on March 17, 1981 in the Clerk's Office of the Middle District of Alabama of a notice of right to sue issued on January 27, 1981 by the United States Department of Justice. (R. 1) An incomplete pauper affidavit was received on March 24, 1981. A Judge of the Middle District, R. L. Varner, granted permission to proceed as a pauper on March 30, 1981 and ordered the matter transferred to the Southern District of Alabama on the 6th day of April, 1981. (R. 13) On April 7 the Court wrote Ms. Brown stating:

"Under the law you have 90 days after the date of the EEOC letter to file a petition . . . On some occasions your letter written to the Court asking for appointment of counsel and that the letter be considered as your petition for relief may be considered as a petition within the 90 day time period."

On April 15 the Magistrate for the Southern District issued an order in which he reminded the plaintiff that a complaint must be filed within 90 days after the date of the notice of right to sue. The order also included instructions respecting the appointment of an attorney. (R. 17-19) On

May 6, 1981 an unsigned affidavit, and a motion for appointment of counsel was submitted. (R. 19-23) On May 7 the Magistrate entered his order denying the motion for appointment of counsel and referring the question of whether or not the filing of the right to sue letter was the "filing of a complaint with the court" within the meaning of Rule 3 of the Federal Rules of Civil Procedure to the District Judge. (R. 29) One hundred and thirty days after the date of the right to sue letter, on June 9, 1981, a complaint was filed by an attorney. This complaint was served on June 18, 1981. On December 24, 1981 the District Judge, W. B. Hand, entered an order in which he held that the right to sue letter failed to meet the requirements under Federal Rules of Civil Procedure 8 for a complaint, and that the 90 days having run, the Title VII claim was forfeited. He held that the formal complaint filed on June 9, 1981 contained allegations in addition to the Title VII claims, and therefore this portion of the suit was preserved. This order was amended on January 4, 1982 to permit interlocutory appeal, which appeal was taken, and resulted in the order of January 31, 1983 for which reconsideration, and *en banc* consideration was requested by the defendant-appellee. The petition for reconsideration with suggestions for rehearing *en banc* was denied on April 8, 1983.

B. FACTS

The essential facts necessary for consideration are set

forth in the Statement of the Course of Proceedings above, and are summarized on the table below:

Date	Time Elapsed From Receipt of Notice of Right to Sue	Item	Record Reference
Nov. 6, 1979		Original Complaint with the EEOC	R. p. 37
Jan. 27, 1981		Notice of Right to Sue within 90 days	R. p. 1
Jan. 30, 1981		Presumed date of Receipt Per FRCP 6(e)	R. p. 27
Mar. 17, 1981	46 days	Notice of Right to Sue received by Clerk of the Middle Dist. of Alabama	R. pp. 1 & 5
Mar. 18, 1981	47 days	Papers sent to Brown by Clerk	R. pp. 4 & 6
Mar. 24, 1981	53 days	Pauper Affidavit received by Clerk	R. p. 19
Mar. 30, 1981	59 days	Pauper Status granted by Court	R. p. 19
Apr. 6, 1981	66 days	Matter transferred to Southern District	R. p. 14
Apr. 7, 1981	67 days	Letter from Court to Brown warning of 90 day limit	R. p. 16
Apr. 15, 1981	75 days	Order of Magistrate, Southern District with questionnaire respecting appointment of counsel, and reminder that a complaint must be filed within 90 days	R. p. 17
Apr. 30, 1981	90 days	End of 90 day period	
May 6, 1981	96 days	Unsigned Questionnaire received by Clerk	R. p. 19
May 7, 1981	97 days	Order of Magistrate denying appointment of counsel and raising question of whether complaint, as required per Rule 3 FRCP, had been filed	R. pp. 25-29
June 8, 1981	130 days	Complaint filed	R. p. 33
June 19, 1981	140 days	Complaint served	R. p. 40

REASONS FOR GRANTING THE WRIT

As this Court, speaking through Justice Stevens, observed in *Mohasco v. Silver*, 447 U.S. 807, 65 L. Ed. 2d 532, 100 S. Ct. 2486 "... in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of even-handed administration of the law." 65 L. Ed. 2d at 548. This is particularly true in view of the glut of litigation recently so eloquently commented upon by the Chief Justice in public remarks.

A survey of cases out of the several circuits reveals that out of nine cases decided by courts of appeals on questions similar to the one at bar, three courts have held that tolling was not available. *Wong v. The Bon Marche*, 508 F. 2d 1249 (1975, C.A. 9 Wash.); *Hinton v. CPC International, Inc.*, 520 F. 2d 1512 (1975 C.A. 8 Missouri); and *Genevose v. Shell Oil Co.*, 488 F. 2d 84 (1975 C.A. 5 La.). Two appellate courts, while holding that tolling is available, held that under circumstances in particular cases it was not allowed. *Nilsen v. City of Moss Point*, 621 F. 2d 117 (1980 5th Cir. Mississippi) and *Harris v. National Tea Co.*, 454 F. 2d 307 (1971 C.A. 7 Ill.). The remaining cases have held that tolling of the statute of limitations is available, and have allowed tolling under the circumstances of the specific cases. *Alexander v. Gardner Denver Co.*, 466 F. 2d 1209, reversed on other grounds, 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011, on remand *aff'd*, C.A. 10 Colorado, 519 F. 2d 503, certiorari denied, 423 U.S. 1058, 46 L. Ed. 2d 648, 96 S. Ct. 793 (1972 C.A. 10 Colorado); *Harris v. Walgreen Distributors*, 456 F. 2d (1972 C.A. 6 Tenn.); *Houston v. General Motors Corp.*, 477 F. 2d 1003 (1973 C.A. 8 Missouri); and *Wrenn v. American Cast Iron Pipe Co.*, 575 F. 2d 544 (1978 C.A. 5 Alabama).

It is apparent that the circuit courts are groping for an equitable rule by which to interpret the Title VII statute of limitations. The United States Supreme Court has not directly addressed this question. However, in *Mohasco v.*

Silver, 447 U. S. 807, 65 L. Ed. 2d 532, 100 S. Ct. 2486 (1980), the court made a glancing in reference to the problem in a footnote, "petitioner did not assert respondents' failure to file the action within 90 days as a defense." 447 U.S. at 811, note 9, 65 L. Ed. 2d 532, 100 S. Ct. 2486.

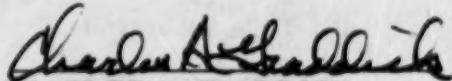
There are three cases in which the Supreme Court has addressed the question of timeliness of filing of charges with the commission within a time period set forth in Title VII. *Love v. The Pullman Co.*, 404 U.S. 522, 30 L. Ed. 2d 679, 92 S. Ct. 616 (1972); *Electrical Workers v. Robbins and Myers, Inc.*, 429 U.S. 229, 50 L. Ed. 2d 427, 97 S. Ct. 441 (1976); *Zipes v. Transworld Airlines*, 455 U.S. 385, 71 L. Ed. 2d 234, 102 S. Ct. 1127, reh. den. (U.S.) 72 L. Ed. 2d 461, 102 S. Ct. 2001. While it is tempting to analogize the provisions of Title VII respecting the bringing of a complaint before the EEOC to the provisions respecting the bringing of civil action before the federal courts, there is a substantial difference. Bringing a complaint before the EEOC is a layman's action unassisted and unencouraged, while bringing a civil action before the district courts cannot occur until the right to sue notice is issued; the procedures before the EEOC are designed to encourage to a claimant to bring his action before the federal court if he is dissatisfied by the results before the EEOC. Furthermore, the district courts, and their clerks, are very solicitous of those who attempt to bring these actions. The record in the instant case is replete with examples of such helpfulness.

CONCLUSION

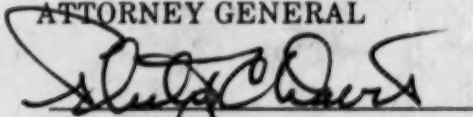
During the period before the amendment to Title VII on March 24, 1972, when a layman had only 30 days to bring his action, equitable principles and a sense of fair play and generosity led to a search for means to relieve the pressure of such a short period of time. However, Congress has now given the complainant an entire quarter of a year in which to bring his claim before the courts. Obviously, no statute of limitations will be long enough to suit some persons, and there will always be those who, even with meritorious

claims, will wait until too late, or will not take effective action during the period of time specified. There must ultimately be some deadline, and that deadline is provided by a statute of limitations. Fairness and equity require the tolling under certain circumstances. *Chappel v. Emco Machine Works, Co.*, 601 F. 2d 1295 (1979). This is particularly true when the complainant was misled by the EEOC, the employer or the court. In the case at bar, none of these circumstances exist. The courts and their clerks did everything except write a complaint for Brown, and the defendant was totally unaware of any of this. The simple fact is that Brown made a half-hearted attempt to set machinery in motion for her benefit, but never actually took the full step required, the filing of some form of complaint or documentation which could be interpreted as a pro se complaint within the time period specified by Congress. The Title VII aspects of the complaint filed on June 9, 1981 were appropriately dismissed by the district court and that action should be sustained by this Court.

Respectfully submitted,



CHARLES A. GRADDICK
ATTORNEY GENERAL



PHILIP C. DAVIS
ASSISTANT ATTORNEY
GENERAL

DATE: July 6, 1983

ADDRESS OF COUNSEL:
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205/834-5150

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-7033
Non-Argument Calendar

CELINDA BROWN,

Plaintiff-Appellant,

versus

BALDWIN COUNTY WELCOME CENTER,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Alabama

(January 31, 1983)

Before TJOFLAT, JOHNSON and HATCHETT,
Circuit Judges.

PER CURIAM:

This is an appeal of an interlocutory order under 28 U.S.C.A. § 1292(b). The issue presented in this case is whether an Equal Employment Opportunity Commission's (EEOC) right-to-sue letter, filed with the court *in forma pauperis*, tolls the ninety day statute of limitations provided in 42 U.S.C.A. § 2000e-5(f) (1). We hold that it does and reverse and remand the case to the district court.

Celinda Brown, appellant, filed charges of employment discrimination with the EEOC against her employer, the

Baldwin County Welcome Center (Welcome Center) of the State of Alabama. About two years later, the United States Department of Justice mailed Brown a "notice of right-to-sue within ninety days." Upon receiving the notice, Brown mailed it to the United States District Court clerk's office in the Middle District of Alabama. In addition, she requested court appointed counsel. Since then events giving rise to the charge occurred in the Southern District of Alabama, the case was transferred to that district. The middle district court also informed Brown by letter that it would be safer to file a petition within the ninety days time period rather than risk using the right-to-sue letter as a petition.*

Upon receipt of the case in the southern district, a magistrate requested that Brown complete a questionnaire and reiterated the necessity of filing a complaint. Additionally, the magistrate advised Brown that she should attempt to obtain representation from a legal aid office. Brown completed the affidavit for *in forma pauperis* and returned it to the magistrate. The magistrate denied Brown's motion for counsel because she failed to timely comply with his orders. The magistrate referred to a district court judge the question of whether Brown's efforts could be recognized as the filing of a "case." By this time, Brown had obtained assistance from the Legal Services Corp., and that organization filed an affidavit of indigency which was accepted by the

*The letter stated:

On some occasions, your letter written to the Court asking for appointment of counsel and that the letter be considered as your petition for relief may be considered as a petition within the 90-day time. However, to be safe, you should file a petition on or before the ninetieth day after the day of the letter from the EEOC informing you of your right to sue. That petition should be filed in the United States District Court for the Southern District of Alabama in Mobile.

I am transferring the whole file and calling attention to the fact that you have asked that the court appoint you an attorney.

district court. Legal Services also filed an "amended" complaint which greatly expanded upon and clarified Brown's claim of discrimination. The Welcome Center responded by arguing that Brown's filing of the right-to-sue letter did not toll the statute of limitations. The district court held that Brown's filing of her right-to-sue letter did not comply with the requirements of Fed.R.Civ.P. 8 for filing of a "complaint," thus concluding that Brown forfeited her right to pursue her Title VII claim.

We follow the lead provided in *Wrenn v. American Cast Iron Pipe Co.*, 575 F. 2d 544 (5th Cir. 1978). In *Wrenn*, the former Fifth Circuit stated:

[T]hat, in the special context of Title VII, the statutory requirement that an action be "brought" within the time period is satisfied by presenting a right-to-sue letter to the court and requesting the appointment of counsel. *Huston v. General Motors Corp.*, 477 F. 2d 1003 (8th Cir. 1973); *Pace v. Super Valu Stores, Inc.*, 55 F.R.D. 187 (S.D. Iowa 1972); *McQueen v. E.M.C. Plastic Co.*, 302 F.Supp. 881 (E.D. Tex. 1969); *Austin v. Reynolds Metals Co.*, 327 F.Supp. 1145, 1147-1151 (E.D. Va. 1970); see Annot. 4 A.L.R.F. 833 at § 12[c], [d]. The court may then . . . specify an extended time for the more exact requirements of pleading.

575 F.2d at 546. As the court in *Wrenn* admitted, this interpretation of Title VII is generous. The remedial nature of the statute requires such an interpretation. Additionally, such a holding is consistent with past decisions which liberally construe actions brought by individuals without a lawyer. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Brown's diligence in this case was sufficient to justify the district court's attention to her matter.

We hold that Brown's filing of her right-to-sue letter satisfied the ninety day statutory limitation. This case is reversed and remanded for further proceedings.

REVERSED AND REMANDED.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

CELINDA BROWN,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL ACTION NO. 81-0241-H
)	
BALDWIN COUNTY)	
WELCOME CENTER)	
)	
Defendant.)	

ORDER

The issue before the Court is whether a pro se plaintiff can commence an employment-discrimination suit under 42 U.S.C., §2000e by merely filing a copy of a right-to-sue letter issued by the United States Department of Justice. For the reasons below, the Court holds that in this case the simple filing of the right-to-sue letter was inadequate to commence a civil action under 42 U.S.C., §2000e-5(f) (1).

An order which the Magistrate entered on May 7, 1981, thoroughly details the events surrounding the filing by the plaintiff of her right-to-sue letter with the Court. The Court adopts the Magistrate's recitation of the facts. Nothing would be gained by repeating them.

The Court finds it especially significant that the right-to-sue letter which the United States Department of Justice issued wholly fails to indicate the factual basis upon which

the alledged claim of discrimination was based. The notice says absolutely nothing about the factual situation involved with the discrimination claim. The sole function served by the notice issued in this case is to notify the plaintiff that if she chooses to commence a civil action "such suit must be filed in the appropriate United States District Court within ninety days of [her] receipt of this Notice."

The Notice is crystal clear that a further step must be taken by the plaintiff if she wishes to file a civil action. At several points in the Notice, the significance of the ninety-day period is emphasized.

This case is readily distinguishable from the many cases which discuss the end's and out's of right-to-sue letters. Ordinarily, the issue presented for decision is when the plaintiff was put on notice that the administrative proceedings before the EEOC had terminated. This is not questioned in the case at bar.

"42 U.S.C.A., §2000e-5(f) (1) [requires] that civil actions be commenced within ninety days after receiving notice of the right to sue." *Nilsen v. City of Moss Point, Mississippi*, 621 F.2d 117, 120 (Fifth Cir. 1980). The plain language of 42 U.S.C. §2000e-5(f) (1) and Fed.R.Civ.P. 3 demonstrate that a right-to-sue letter is not equivalent to a complaint.

In deciding this issue, the Court is left to grapple with conflicting authority. In *Wrenn v. American Cast Iron Pipe Company*, 575 F.2d 544 (Fifth Cir. 1978), the Court of Appeals held that "in the specific context of Title VII, the statutory requirement that an action be 'brought' within the time period [mandated by section 2000e-5(f) (1)] is satisfied by presenting a right-to-sue letter to the Court and requesting the appointment of counsel." *Id.* at 546. The *Wrenn* case was decided on June 21, 1979. In contrast, on June 23, 1978, the United States Court of Appeals for the Fifth Circuit held that "42 U.S.C. §2000e-5(f) (1) requires that a complaint be filed within ninety days after receipt of a right-to-sue letter, and this ninety-day period has been held to be jurisdictional." *Prophet vs. Armco Steel, Inc.*, 575 F.2d 579, 580 (Fifth Cir. 1978). The *Prophet* Court held that

the Court may not extend the ninety-day period in that an action filed within ninety one days is time barred. *Id.*

The more recent decision in *Nilsen* follows *Prophet*. Indeed the better view would seem to be that announced by the *Prophet* decision. Fed.R.Civ.P. 8 sets forth the requirements for filing a complaint. At the very minimum, the accusatory instrument should contain a short and plain statement of the factual basis upon which the claim rests.

The Court holds that the plaintiff has forfeited her right to pursue her Title VII claim because of her failure to file a complaint which meets the requirements of Rule 8 of the Federal Rules of Civil Procedure within ninety days after receiving her right-to-sue letter from the United States Department of Justice on January 27, 1981.

The formal complaint which the plaintiff filed on June 9, 1981, contains allegations in addition to the allegation made under Title VII. Without further objection from the defendant, the Court presumes that these claims are ready for trial and that this case can be pretried on January 13, 1982, as originally scheduled.

DONE this 24th day of December, 1981.

/S/
W. B. HAND
CHIEF U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CELINDA BROWN,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL ACTION NO. 81-0241-H
)	
BALDWIN COUNTY)	
WELCOME CENTER,)	
)	
Defendant.)	

AMENDED ORDER

Plaintiff, on January 4, 1982, filed her MOTION TO AMEND ORDER TO CONTAIN APPLICATION TO ALLOW INTERLOCUTORY APPEAL OR, IN THE ALTERNATIVE, MOTION TO RECONSIDER in conjunction with an order entered by the Court on December 24, 1981. That order dealt with the issue of whether the filing of an EEOC right-to-sue letter with the Court of appropriate jurisdiction tolls the 90-day limitation provided for in 42 U.S.C. §2000e-5(f) (1). The Court held, *inter alia*, that under the facts of this case, plaintiff, "... forfeited her right to pursue her Title VII claim because of her failure to file a complaint which meets the requirements of Rule 8 of the *Federal Rules of Civil Procedure* within ninety days after receiving her right-to-sue letter from the United States Department of Justice on January 27, 1981."

The Court amends that order so as to include the following: that the December 24, 1981 order involves a controlling question of law as to which there is substantial ground

for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Accordingly, an immediate appeal from that order and pursuant to 28 U.S.C. §1292(b) would seem appropriate. It is therefore

ORDERED, ADJUDGED and DECREED that these proceedings be stayed until such time as the appellate court considers the matter and, further, that is favorably considered so as to allow an interlocutory appeal, that such stay remain in effect until such time as a final order is entered by the appellate court.

DONE this 5th day of January, 1982.

/S/ _____
CHIEF JUDGE

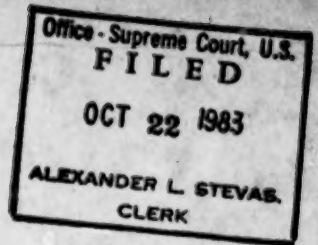
CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of July, 1983, three copies of the above and foregoing Petition for Writ of Certiorari were mailed, postage prepaid, to the Honorable Joseph Carr, IV, attorney and counsel for the respondent. I further certify that all parties required to be served have been served.

A large, stylized handwritten signature in black ink, appearing to read 'Philip C. Davis', is written over a horizontal line.

**PHILIP C. DAVIS
ASSISTANT ATTORNEY
GENERAL**

**COUNSEL FOR THE
PETITIONER**



NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

BALDWIN COUNTY WELCOME CENTER,

Petitioner

vs.

CELINDA BROWN,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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DATE: October 20, 1983

INDEX

	Page
TABLE OF CITATIONS	ii
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. STATEMENT OF THE COURSE OF PROCEEDINGS BELOW AND DISPOSITION OF THE CASE BELOW	3
B. FACTS	7
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	8
A. INTRODUCTION	8
B. SUMMARY OF THE ARGUMENT	11
C. ARGUMENT	12
CONCLUSION	31
CERTIFICATE OF SERVICE	32

TABLE OF CITATIONS

<u>Cases:</u>	<u>Page</u>
<u>Albemarle Paper Co. v. Moody,</u> 422 U.S. 405 (1975)	29
<u>Alexander v. Gardner-Denver Co.,</u> 415 U.S. 36, 47 (1974)	20
<u>Aljadir v. University of Pennsylvania,</u> 547 F.Supp. 667 (E.D. Pa. 1982)	25
<u>Banks v. Teletype Corp.,</u> 563 F.Supp. 1358 (E.D. Ark., 1973)	22
<u>Bell v. Eagle Motor Lines,</u> 693 F.2d 1086 (11th Cir. 1982)	25
<u>Billings v. Wichita State University,</u> 557 F.Supp. 1348 (D.C. Kan. 1983)	27
<u>Brown v. Baldwin County Welcome Center,</u> unrptd. Docket No. 81-0241-H (S.D. Ala., Dec. 24, 1981)	12,13
<u>Carlile v. South Routt School Dist.,</u> 652 F.2d 981 (10th Cir. 1981)	18
<u>Christianburg Garment Co. v. EEOC,</u> 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978)	29
<u>Coke v. General Adjustment Bureau, Inc.,</u> 640 F.2d 584 (5th Cir. 1981)	18
<u>Cox v. Consolidated Rail Corp.,</u> 557 F.Supp. 1261 (D.C. D.C. 1983)	25,27
<u>David v. Sears, Roebuck & Co.,</u> 29 F.E.P. 1341 (D.C. Mass. 1982)	25
<u>Davis v. Sears, Roebuck & Co.,</u> 708 F.2d 862 (1st Cir. 1983)	25
<u>Decker v. Anheuser-Busch,</u> 588 F.Supp. 445 (M.D. Fla. 1983)	26
<u>Delaware State College v. Ricks,</u> U.S. _____, 101 S.Ct. 498, _____ L.Ed.2d _____ (1980)	29

<u>Electrical Workers v. Robbins & Myers,</u> 429 U.S. 229, 240 (1976)	19
<u>Fouch v. Jekyll Island-State Park Authority,</u> 713 F.2d 518 (11th Cir., 1983)	23
<u>Fox v. Eaton Corp.,</u> 615 F.2d 716 (6th Cir. 1980)	17
<u>Garrison v. International Paper Co.,</u> 714 F.2d 757 (8th Cir. 1983)	23
<u>Genovese v. Shell Oil Company,</u> 488 F.2d 84 (5th Cir. 1973)	17,18
<u>Goodman v. City Products Corp.,</u> 525 F.2d 702 (6th Cir. 1970)	18
<u>Guardian's Association of the New York City Police Dep. v. Civil Service Commission,</u> 633 F.2d 232 (2nd Cir. 1980), <u>aff'd</u> 51 U.S.L.W. 5105	29
<u>Haines v. Kerner,</u> 404 U.S. 519, 520 (1972)	1
<u>Harper v. Burges,</u> 701 F.2d 29 (4th Cir. 1983)	25
<u>Harris v. National Tea Company,</u> 454 F.2d 307 (7th Cir. 1971)	14
<u>Hart v. J. T. Baker Chemical Co.,</u> 598 F.2d 829 (3rd Cir. 1979)	18
<u>Huston v. General Motors Corp.,</u> 477 F.2d 1003 (8th Cir. 1973)	12,13,18
<u>Jackson v. Seaboard Coast Line Railroad Co.,</u> 678 F.2d 992 (11th Cir. 1982)	22,23
<u>Laffey v. Northwest Airlines, Inc.,</u> 567 F.2d 429 (D.C. Cir. 1976)	19
<u>Law v. Hercules,</u> 713 F.2d 691 (11th Cir. 1983)	25
<u>Leake v. University of Cincinnati,</u> 605 F.2d 255 (6th Cir. 1979)	11,17,18
<u>Lewis v. Connors Steel Co.,</u> 673 F.2d 1240 (11th Cir. 1982)	25

<u>Love v. Pullman Co.,</u> 402 U.S. 522 (1972)	20
<u>McCrary v. Metropolitan Life Ins. Co.,</u> 408 F.Supp. 414 (D.C. Mass. 1976)	22
<u>McDonnell Douglas Corp. v. Green,</u> 411 U.S. 792, 798 (1973)	20
<u>McQueen v. E.M.C. Plastic Co.,</u> 302 F.Supp. 881 (E.D. Tex. 1969)	16
<u>Mohasco Corp. v. Silver,</u> 447 U.S. 708 (1980)	29
<u>Moshos v. Dist. Council of New York, Local Union 1456,</u> 386 F.Supp. 21 (S.D. N.Y. 1974)	19
<u>Pace v. Super Valu Stores, Inc.,</u> 55 F.R.D. 187 (S.D. Iowa 1972)	15,18
<u>Perdue v. Roy Stone Transfer Corp.,</u> 690 F.2d 1091 (4th Cir., 1982)	24
<u>Pinkard v. Pullman-Standard,</u> 678 F.2d 1211, 1217-18 (5th Cir. 1982)	23
<u>Platoro Ltd., Inc. v. Unidentified Remains, Etc.,</u> 614 F.2d 1051 (5th Cir. 1980)	19
<u>Prophet v. Armco Steel, Inc.,</u> 575 F.2d 579, 580 (5th Cir. 1978)	16
<u>Reyes v. Missouri-Kansas-Texas Railroad Company,</u> 43 F.R.D. 923 (D.C. Kan. 1971)	15,19
<u>Rice v. Chrysler,</u> 327 F.Supp. 80-84 (E.D. Mich. 1971)	16
<u>Rice v. New England College,</u> 676 F.2d 9 (1st Cir. 1982)	25
<u>Sanchez v. Standard Brands,</u> 431 F.2d 455, 466 (5th Cir. 1970)	29
<u>Scarlett v. Seaboard Coast Line Railroad Co.,</u> 676 F.2d 1043, 1049 (5th Cir. 1982)	23
<u>Thomas v. KATV Channel 7,</u> 692 F.2d 548 (8th Cir. 1982)	26

<u>Torockio v. Chamberlain Mfg. Co.,</u> 328 F.Supp. 578, 580 (W.D. Pa. 1971)	16
<u>United States Airlines, Inc. v. Evans,</u> 431 U.S. 553, 555, n.4 (1977)	20
<u>Watson v. Republic Airlines, Inc.,</u> 553 F.Supp. 939, 942 (N.D. Ga., 1982)	23
<u>Williams v. General Foods Corp.,</u> 492 F.2d 397, 404-405 (7th Cir. 1974)	29
<u>Williamson v. Bethlehem Steel Corp.,</u> 418 F.2d 1201 (2nd Cir. 1970), <u>cert. den.</u> 411 U.S. 911	29
<u>Witherspoon v. Mercury Freight Lines,</u> 59 L.C. 9219 (S.D. Ala. 1969)	13
<u>Wong v. Bon Marche,</u> 508 F.2d 1249 (9th Cir. 1975)	17
<u>Wrenn v. American Cast Iron Pipe Co.,</u> 575 F.2d 544 (5th Cir. 1978)	1,9,17,18
<u>Zipes v. Trans World Airlines, Inc.,</u> 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 461 (1982)	9,10,11,12, 22,23,26,28

Statutes:

28 U.S.C. §1292(b)	6
42 U.S.C. §§2000e, <u>et seq.</u>	8,11,19
42 U.S.C. §2000e-5(e)	9,10,14,17, 20,21,22
42 U.S.C. §2000e-5(f)(1)	2,3,4,8,9, 10,11,12,18, 20,21,22,23, 24,31
Rule 3, F.R.C.P.	8
Rule 8, F.R.C.P.	13
Rule 12, F.R.C.P.	7

Miscellaneous:

Wright & Miller, Civil \$1214 17

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

NO. _____

BALDWIN COUNTY WELCOME CENTER,

Petitioner

vs.

CELINDA BROWN,

Respondent

OPINION BELOW

Relying upon the decision in Wrenn v. American Cast Iron Pipe Co., 575 F.2d 544 (5th Cir. 1978) and the other authorities cited therein, the Eleventh Circuit, reversing the district court below, held:

"The remedial nature of [Title VII] requires such an interpretation. Additionally, such a holding is consistent with past decisions which liberally construe actions brought by individuals without a lawyer. Haines v. Kerner, 404 U.S. 519, 520 (1972). Brown's diligence in this case was sufficient to justify the District Court's attention to her matter."

With this, the Eleventh Circuit found that under the facts presented, respondent's filing of her right-to-sue letter

satisfied the 90-day statutory limitation provided for in 42 U.S.C. §2000e-5(f)(1).

JURISDICTION

Respondent adopts the jurisdictional statement set forth in petitioner's brief.

QUESTION PRESENTED

Whether, under the facts of this case, respondent's filing of an EEOC right-to-sue letter with a court of appropriate jurisdiction tolls the 90-day limitation provided for in 42 U.S.C. §2000e-5(f)(1)?

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §2000e-5(f)(1).

STATEMENT OF THE CASE

A. STATEMENT OF THE COURSE OF PROCEEDINGS BELOW AND DISPOSITION OF THE CASE BELOW:

On November 6, 1979, Ms. Celinda Brown filed her original complaint with the Equal Employment Opportunity Commission¹ alleging, inter alia, discriminatory treatment by her prior employer, Baldwin County Welcome Center.² A fact-finding conference and other mediation efforts by the EEOC in conjunction with respondent's complaint were not productive and, on January 27, 1981, a right-to-sue letter was issued to her by the United States Department of Justice. (R. 1). The right-to-sue letter instructed respondent to, "... take [it], along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the United States District Court in Montgomery." (Emphasis supplied). (R. 1). Ms. Brown followed these instructions faithfully, filing the right-to-sue letter and a typed request for appointment of counsel in the Middle District on March 17, 1981 (R. 7), well within the 90-day period required by 42 U.S.C. §2000e-5(f)(1).³

¹That complaint was further amended by respondent on or about December 10, 1979. (R. 37).

²Petitioner suggested by way of their answer below that the Alabama Bureau of Publicity and Information, as opposed to the Baldwin County Welcome Center, is the appropriate state agency (the actual employer of respondent) (R. 42); their counsel accepted service on behalf of that agency.

³Respondent's good faith efforts to get her case in

Judge Robert E. Varner of the Middle District granted respondent leave to proceed in forma pauperis⁴ (R. 13), and transferred the case to the Southern District on April 6, 1981. According to the Magistrate, the file was received by him on April 14, 1981. (R. 15). The following day, he entered an order requiring, among other things, that respondent again make application for court-appointed counsel using the Southern District's own form and supporting questionnaire. (R. 17-18). Ms. Brown did so, and it was not received by the Court until May 6, 1981.⁵ (R. 19-23)

At the Magistrate's suggestion in his order of April 15, 1981 (R. 17-18), Ms. Brown drove 75 miles from her home to

federal court become more greatly pronounced when one considers her place of residence, Sulligent, Alabama, a remote rural community situated in Lamar County, approximately 180 miles from the Middle District Courthouse in Montgomery, and 270 miles from the Southern District Courthouse in Mobile.

⁴By way of footnote, the Magistrate made the following observation in his order: "This Court has no local rule, and apparently no standing order, dealing with [whether the 90-day statute of limitations is tolled by the filing of a right-to-sue letter]. The situation appears to be the same in the Middle District of Alabama." (R. 28). Regarding the latter observation, it is apparently incorrect. There is in fact a local rule dealing with the question: "Upon application to proceed in forma pauperis and presentation or filing of the right-to-sue letter, the 90-day statute of limitations is tolled until the Court rules on plaintiff's petition to proceed in forma pauperis."

⁵For reasons, unclear to this writer, the Magistrate noted that this was, "... , almost a week after the ninetieth day." If respondent's filing in the Middle District was timely, then the 90-day requirement of 42 U.S.C. §2000e-5(f)(1) had no relevance to the date she applied for

the nearest office of Legal Services situated in Tuscaloosa, Alabama. That office, in turn, transferred the case to the Mobile Regional Office, which undertook representation of her and filed a verified amended complaint on June 9, 1981. (R. 33-37).

Although the Magistrate in his order of May 7, 1981 was critical of respondent for her perceived lack of diligence in pursuing the matter (R. 27-29), it is respectfully suggested that such criticism was and is ill-founded. Given the distances from respondent's residence to the Middle and Southern Districts, given the distances between respondent's residence and the Tuscaloosa and Mobile Offices of Legal Services, given the instructions of the EEOC to respondent to file in the Middle District, given the fact that the case was transferred, sua sponte, by the Middle District Judge, and given the fact that Ms. Brown has been forced to deal with the courts and her attorneys principally via the U.S. Mails, it is suggested that the chronology of respondent's efforts to get her case in court evidences the fact that she was wholly diligent in this regard.

On December 24, 1981, the District Court dismissed all allegations in respondent's COMPLAINT relating to discrimination under Title VII. (R. 67-68).

court-appointed counsel in the Southern District.

The District Court, however, did not dismiss the claims made in paragraph 8 of the original COMPLAINT:

"Further, [respondent] alleges and avers that her aforementioned termination was based in whole or substantial part upon her legitimate exercise of rights secured under Amendment I and Amendment XIV of the United State Constitution and, more specifically, that her termination was based in whole or substantial part upon her filing of her original complaint with the EEOC prior to such termination, such act constituting her legitimate exercise guaranteed by Amendment I and Amendment XIV of the United States Constitution to freely petition her government for redress of grievances."

On January 4, 1982, respondent filed a MOTION TO AMEND ORDER TO CONTAIN APPLICATION TO ALLOW INTERLOCUTORY APPEAL OR, IN THE ALTERNATIVE, MOTION TO RECONSIDER. (R. 74-75). The District Court entered an AMENDED ORDER the following day, agreeing, "[t]hat the December 24, 1981 order involves a controlling question of law as to which there is substantial ground for difference of opinion ..." (R. 70-71), resulting in the interlocutory appeal to the Eleventh Circuit pursuant to 28 U.S.C. §1292(b) which was timely perfected thereafter. (R. 76).

This appeal resulted in the January 31, 1983 per curium order of the Eleventh Circuit, reversing and remanding the case to the district court and setting aside its dismissal of respondent's Title VII claims. Petitioner's request for reconsideration with suggestion for rehearing en banc was denied on April 8, 1983.

B. FACTS:

The facts of the case are set forth above. Additionally, those facts alleged by respondent in her initial pro se filing in the district court (R. 7), and those of her attorney thereafter (R. 33-37) must, on appeal, be deemed true given the Rule 12, sua sponte dismissal by the district court.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. INTRODUCTION

At the suggestion of the Magistrate,⁶ the District Court below refused to allow respondent to proceed with her claims for relief arising under Title VII, 42 U.S.C.

§§2000e, et seq.⁷

The sole issue presented on appeal to the Eleventh Circuit and now for this Court's review, if certiorari is granted, is whether, under the facts of this case, respondent's filing of an EEOC right-to-sue letter with a court of appropriate jurisdiction tolled the 90-day limitation provided for in 42 U.S.C. §2000e-5(f)(1).

Although there is authority, which will be discussed herein, holding that would-be plaintiffs who do nothing to bring their cases to the attention of a federal court prior to the expiration of the 90-day statutory period are time-barred, this writer has found no reported decision dismissing a Title VII action where the would-be plaintiff, as here, has formally brought the matter to the attention of

⁶"If the filing of the right-to-sue letter is 'filing of a complaint with the court' within the meaning of Rule 3 of the Federal Rules of Civil Procedure, this is a case in which the 'complaint' can be amended. If it is not, of course, this file is not a lawsuit. That question is one for the district judge." (R. 29).

⁷"The court holds that the plaintiff has forfeited her right to pursue her Title VII claim because of her failure to file a complaint which meets the requirements of Rule 8 of the Federal Rules of Civil Procedure within ninety days

a federal court. Were this Court to hold otherwise, it would have the effect of overruling a long line of federal court decisions holding that equitable principles should apply vis-a-vis the 90-day statute of limitations provided for in 42 U.S.C. §2000e-5(f)(1). Eq., Wrenn v. American Cast Iron Pipe Co., 575 F.2d 544 (5th Cir. 1978).

Denying would-be plaintiffs a federal forum to redress violations of their civil rights runs counter to the remedial purpose and congressional intent upon which Title VII of the Civil Rights Act of 1964 was and is grounded. Eq., Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979).

Lastly, the holding of the district court was at odds with the recent decision of the United States Supreme Court in Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 461 (1982)⁸ and its progeny, which holds that the provisions granting district courts jurisdiction under Title VII, 42 U.S.C. §2000e-5(e) and (f), does not limit jurisdiction over those cases in which there has been a timely filing with the EEOC.⁹

after receiving her right-to-sue letter from the United States Department of Justice on January 27, 1981." (R. 68).

⁸In all deference and fairness to the district court below, it did not at the time of its December 24, 1981 order appealed from have the benefit of Zipes, supra, and its resolution of the theretofore split of authority as to whether the filing requirements contained in 42 U.S.C. §2000e-5(e) and (f) were jurisdictional.

⁹Zipes, supra, will be analyzed in greater detail herein.

Based upon the foregoing reasons, respondent respectfully requests that the petition be denied or, if granted, that a decision be rendered consonant with Zipes and the substantial number of federal decisions which have uniformly followed the teachings of Zipes.

Suffice it to say at this juncture that, although the case dealt with the timely filing of charges with the EEOC, 42 U.S.C. §2000e-5(e), as opposed to the timely filing of a right-to-sue letter, 42 U.S.C. §2000e-5(f)(1), the court did in its ratio decidendi analogize to the split of authority with respect to the latter, 90-day filing requirement.

B. SUMMARY OF THE ARGUMENT

Under the facts of this case,¹⁰ respondent's COMPLAINT (to the extent it raised claims under Title VII) was not due to be dismissed in that the district court's holding that the, "... simple filing of the right-to-sue letter was inadequate to commence a civil action under 42 U.S.C. §2000e-5(f)(1)," (R. 67), is simply not the law. More specifically, the 90-day filing requirement contained in that provision is not jurisdictional. Zipes, supra,

Furthermore, the district court failed to take into consideration equitable principles¹¹ mandated by such cases as Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979).

Lastly, the practical implications of the district court's dismissal of respondent's Title VII claims runs counter to the congressional intent and purpose upon which Title VII, 42 U.S.C. §§2000e, et seq., is grounded.

¹⁰Set forth in detail herein at pgs. 2-6, *infra*.

¹¹Respondent's diligent efforts to secure counsel and, more importantly, to make timely efforts to bring her claims before the attention of a court of competent jurisdiction.

C. ARGUMENT

Prior to this Court's decision in Zipes v. Trans World Airlines, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), there was, as noted by petitioner (Petitioner's Brief at pg. 7), a split of authority among the circuits as to the effect of a would-be Title VII litigant's failure to file a formal Rule 8 complaint within the 90-day period allowed for in §42 U.S.C. §2000e-5(f)(1). However, counsel for petitioner can cite to the Court no pre-Zipes federal decision in which the Title VII claims were dismissed as against a plaintiff who filed with the federal court something prior to the expiration of the 90-day limitation and within a reasonable time thereafter cured any technical pleading defect.¹²

In Huston v. General Motors, 477 F.2d 1003 (8th Cir. 1973), the plaintiff received his right-to-sue letter from the EEOC on March 21, 1972. The right-to-sue letter contained a memo which, when signed, constituted a request for the district court to appoint counsel and commence the action without payment of fees, costs, or security. The letter and certain documents, sent to Huston by the EEOC, were tendered to the Clerk of the District for the Western District of Missouri. The Clerk did not file the document;

¹²Save the action taken by Judge Hand in the instant case. Brown v. Baldwin County Welcome Center, unrptd. Docket No. 81-0241-H (S.D. Ala., Dec. 24, 1981). The sole case considering the issue in the Southern District of Alabama

rather, he entered an order appointing counsel for plaintiff. A formal complaint was filed on May 22, 1972, which was beyond the then 30-day limit. The Eighth Circuit held that the request for appointment of counsel constituted the commencement of a civil action within the meaning of Title VII. The Court further stated that the district Court should specify a reasonable time period thereafter for the filing of a formal complaint consistent with the requirements of Rule 8 of the Federal Rules of Civil Procedure.

As noted, the respondent here remained pro se until some time after the Magistrate's order of April 15, 1981 and, thereafter, the case was transferred from the Legal Services Office situated in Tuscaloosa to that situated in Mobile. Given this, the following language from Huston, supra, has relevance to the facts at bar:

"A layman, completely unskilled in the law, cannot be expected to file a formal complaint within the short period of time specified in the statute, and he should not be forced to forfeit his claim when he has done everything in his power within 30 days to bring about legal proceedings to enforce his rights." 477 F.2d at 1008.

prior to Brown was Witherspoon v. Mercury Freight Lines, 59 L.C. 9219 (S.D. Ala. 1969). In Witherspoon, per Thomas, it was held that the plaintiff's petition for appointment of counsel was sufficient to institute his cause of action. The plaintiff, relying on this statement, filed a formal complaint the following month and the lawsuit proceeded. Unfortunately, no further facts were set forth.

Another leading pre-Zipes case allowing a plaintiff additional time in which to file a formal complaint beyond the statutory period was Harris v. National Tea Company, 454 P.2d 307 (7th Cir. 1971). In Harris, supra, the material dates were as follows:

(1) June 24, 1970: Plaintiff received his right-to-sue letter.

(2) June 29, 1970: Plaintiff petitioned the district court for appointment of counsel.

(3) July 1, 1970: The district court denied plaintiff's petition.

(4) July 30, 1970: Plaintiff again petitioned the court for counsel and the petition was granted.

(5) September 14, 1970: Plaintiff's counsel filed a formal complaint.¹³

The Harris court, stating that the language of the statute is clear and unambiguous and must be strictly adhered to by the judiciary, held that a plaintiff must file with the court his complaint within the statutory period. However, the court concluded that the statutory period was tolled upon the plaintiff's first request for counsel. The statute of limitations resumed when the attorney was appointed after plaintiff's second request of July 30;

¹³The case arose prior to the amendment of 42 U.S.C. §2000e-5 increasing the period from 30 to 90 days. Therefore, in Harris, the ultimate filing of a formal complaint came 52 days after the statutory deadline.

therefore, the attorney had 24 days in which to effectuate and file a formal complaint. Thus, the failure of plaintiff to file a formal complaint within the 24 days is subject to proper dismissal for want of subject matter jurisdiction. See also, Reyes v. Missouri-Kansas-Texas Railroad Company, 43 F.R.D. 923 (D.C. Kan. 1971).¹⁴

Again, in Pace v. Super Valu Stores, Inc., 55 F.R.D. 187 (S.D. Iowa 1972), the District Court, citing with approval Huston and Harris, supra, reached the same result based upon the following chronology:

- (1) April 14: Plaintiff received a right-to-sue letter.
- (2) May 10: Plaintiff filed documents with the Clerk of the District Court, including the right-to-sue letter and request for appointment of counsel.
- (3) May 27: The court entered an order denying plaintiff's request and ordered plaintiff 20 days in which to file a formal complaint.
- (4) June 2: Plaintiff filed a handwritten complaint.
- (5) July 15: Counsel was appointed.
- (6) October 1: Counsel filed an amended and substituted complaint.

Thereafter, defendant filed a motion to dismiss or, in the alternative, motion for summary judgment. The Court

¹⁴... the filing of the notice of the right-to-sue letter within the statutory period ... is sufficient to toll the statute ...; the filing of a complaint within a reasonable

held that the papers filed on May 10 without aid of counsel constituted the commencement of the action and met the statutory requirement; thus, plaintiff's action was not subject to dismissal. Moreover, the court reasoned, even if the filing of the papers on May 10 did constitute the commencement of an action, congressional purpose would be satisfied by following the line of cases tolling the statute of limitations by filing the right-to-sue letter within the statutory period and filing a formal complaint within a reasonable time thereafter. This, of course, is precisely what happened in the case at bar.

Arguably, if the appellant here had filed nothing prior to the expiration of the statutory period, the action would be due to be dismissed. Prophet v. Armco Steel, Inc., 575 F.2d 579, 580 (5th Cir. 1978). However, where, as here, a pro se plaintiff makes good faith efforts to diligently and timely approach the court with a right-to-sue letter and written request for counsel, equitable considerations should be entertained due to the harshness and finality of a dismissal with prejudice. So was the wisdom of the court in

time thereafter, ... constitutes substantial compliance with the Act." 43 F.R.D. at 296. The Court went on to indicate that it based its decision primarily upon the remedial purpose of Title VII. See also, Rice v. Chrysler, 327 F.Supp. 80-84 (E.D. Mich. 1971); Torockio v. Chamberlain Mfg. Co., 328 F.Supp. 578, 580 (W.D. Pa. 1971); McQueen v. E.M.C. Plastic Co., 302 F.Supp. 881 (E.D. Tex. 1969).

Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979). There, the court stated that the statute of limitations are, "... jurisdictional in the sense that the phrase in relation to the statute of limitations of equitable principles should apply in circumstances which warrant their application." 605 F.2d at 259.¹⁵

Without exception, those pre-Zipes cases refusing to apply equitable principles and declaring the time requirements of 42 U.S.C. §2000e-5 to be absolutely jurisdictional,¹⁶ arose from fact situations where the would-be plaintiff did nothing (i.e., filed nothing) until after the lapse of the time requirement. As noted, the respondent here did in fact get herself to the courthouse well before the expiration of that period and, thereafter, complied, to the best of her ability, with the instructions from the courts.

With this background, the Fifth Circuit's 1978 ruling in Wrenn v. American Cast Iron Pipe Co., 575 F.2d 544 (5th Cir.

¹⁵See also, Fox v. Eaton Corp., 615 F.2d 716 (6th Cir. 1980) (filing of a Title VII action in state court within the 90-day period tolled the statute for purposes of a subsequent federal Title VII claim after the state court action, on appeal, was dismissed for want of jurisdiction over such claims); Wright & Miller, Civil §1214. Cf., Wong v. Bon Marche, 508 F.2d 1249 (9th Cir. 1975); Genovese v. Shell Oil Company, 488 F.2d 84 (5th Cir. 1973).

¹⁶E.g., Genovese v. Shell Oil Company, supra.

1978), came as no surprise. The issue before the court in Wrenn, supra, was identical to that at bar. The holding (per Roney) was that the statute of limitations contained in 42 U.S.C. §2000e-5 is mandatory and, "... plaintiffs who do nothing to call their case to the attention of the District Court before the period runs will suffer dismissal." (Emphasis supplied). 575 F.2d at 546.¹⁷

However, where the right-to-sue letter is filed within the period of limitation, the Court flatly held:

"... in the specific context of Title VII, the statutory requirement that an action be 'brought' within the time period is satisfied by presenting a right-to-sue letter to the court and requesting the appointment of counsel." (Emphasis supplied) 575 F.2d at 546.¹⁸

In summary, Genovese, supra, governed when the would-be plaintiff did nothing to bring his or her case to the attention of the District Court. However, where, as here, the plaintiff had filed a right-to-sue letter and a written request for appointment of counsel within the statutory period, the requirement of 42 U.S.C. §2000e-5(f)(1) was deemed satisfied. Or, as the Sixth Circuit noted in Leake

¹⁷Citing, Genovese v. Shell Oil Company, 488 F.2d 84 (5th Cir. 1973); Goodman v. City Products Corp., 525 F.2d 702 (6th Cir. 1970).

¹⁸In harmonizing the Wrenn decision with the earlier Fifth Circuit decision in Genovese, supra, the Court cited Huston v. General Motors Corp., 477 F.2d 1003 (8th Cir. 1973) and Pace v. Super Valu Stores, Inc., 55 F.R.D. 187 (S.D. Iowa 1973). See also, Carlile v. South Routt School Dist., 652 F.2d 981 (10th Cir. 1981); Coke v. General Adjustment Bureau, Inc., 640 F.2d 584 (5th Cir. 1981); Hart v. J. T.

v. University of Cincinnati, supra:¹⁹

"... the mere fact that a federal statute providing for substantive relief also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the S of L is tolled under certain circumstances not inconsistent with the legislative purpose." 614 F.2d at 1054.

Having thus far analyzed what are hopefully all of the reported pre-Zipes federal decisions on the issue at hand, it must nonetheless be conceded that some of that case law²⁰ had clouded that issue and, no doubt, confused the district court below. The slate was cleaned, however, by the U.S. Supreme Court decision in Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). In Zipes, supra, "[t]he primary questions in these cases is whether the statutory time limit for filing charges under Title VII of the Civil Rights Act of 1974, 78 Stat. 253, as amended, 42 U.S.C. §§2000e, et seq., (1970 ed.) is a jurisdictional prerequisite to a suit in the District Court." As noted, the procedural facts of the case involved

Baker Chemical Co., 598 F.2d 829 (3rd Cir. 1979); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976); Moshos v. Dist. Council of New York, Local Union 1456, 386 F.Supp. 21 (S.D. N.Y. 1974); Reyes v. Missouri-Kansas-Texas R. Co., 53 F.R.D. 293 (D.C. Kan. 1971).

¹⁹Cited by the Fifth Circuit with approval in Platoro Ltd., Inc. v. Unidentified Remains, Etc., 614 F.2d 1051 (5th Cir. 1980).

²⁰To include several older decisions by the U.S. Supreme Court which loosely referred to the filing requirements of 42 U.S.C. §2000e-5(e) and (f) as "jurisdictional". See, Electrical Workers v. Robbins & Myers, 429 U.S. 229, 240

the 180-day filing requirement of 42 U.S.C. §2000e-5(e) (filing of discrimination charges with the EEOC). However, the ratio diciendi of the Court involved an analogy of case law decided in conjunction with the 90-day requirement of 42 U.S.C. §2000e-5(f)(1), and resulted in a holding, "... that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to a suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 102 S.Ct. at 1132.21

The Court continued:

"In Love v. Pullman Co., 402 U.S. 522 (1972), we announced a guiding principal for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.' 404 U.S., at 527. That principle must be applied here as well." 102 S.Ct. at 1134.

* * *

"By holding compliance with the filing, not be a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation

(1976); United States Airlines, Inc. v. Evans, 431 U.S. 553, 555, n.4 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

²¹In its analysis, the Court (per Justice White) looked to the legislative history of the statutory provisions in question in reaching its decision. Each point made in this

as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." 102 S.Ct. at 1135.

Here, respondent was likewise without the assistance of counsel when she filed her right-to-sue letter and request for appointment of counsel in the Middle District of Alabama (well within the 90-day period). As noted, the Middle District accepted jurisdiction of the case and granted respondent's motion to proceed in forma pauperis. Then, sua sponte, the Middle District transferred the case to the Southern District of Alabama which, in turn, required respondent to submit additional paperwork and documentation. Respondent, still unassisted by counsel, attempted to do so to the best of her ability. It should also be noted that notwithstanding her request, respondent was never afforded court-appointed counsel by either the Middle or Southern Districts.²²

At no time, either in the district court, on appeal to the Eleventh Circuit, or here, has petitioner claimed or even suggested that it had been prejudiced by this chronology or that it did not have notice in fact that from November 6, 1979 (the date appellant filed her original EEOC

analysis applies with equal force to both the 180-day limitation of 42 U.S.C. §2000e-5(e) and the 90-day analog of 42 U.S.C. §2000e-5(f)(1).

²²The April 15, 1981 order of the Magistrate below (R. 17-18) which "... reminded [respondent] that a complaint must be filed within ninety (90) days after the Notice of Right To Sue, ...", also, "... advised [respondent] to

complaint) and all times forward, respondent was doggedly pursuing a race discrimination claim against them.²³

Petitioner, in brief, has totally ignored those federal decisions which had followed in the wake of Zipes, supra. Unhampered by the pre-Zipes confusion over jurisdictional issues which non-compliance of the provisions of §§2000e-5(e) and (f) was thought to engender,²⁴ those decisions, virtually without exception, have gone straight to the issue of whether there exists any of the factors which should cause equitable tolling to obtain.

The analytical process and resulting uniformity of result of these decisions is crystal clear:

A. None of Title VII's pre-conditions for filing suit are jurisdictional:

In Jackson v. Seaboard Coast Line Railroad Co., 678 F.2d 992 (11th Cir. 1982), the appellate court broadly declared that;

approach the Legal Services Corporation and any other legal aid office on her own to see if she can obtain representation." (R. 18). This respondent did, driving to the nearest office of Legal Services Corporation in Tuscaloosa (75 miles one way) which, in turn, referred the case to Legal Services situated in Mobile, Alabama, situs of the Southern District. The attorney-client relationship between respondent and respondent's counsel was cemented on or about May 24, 1981 and respondent's AMENDED COMPLAINT was promptly filed on June 9, 1981. (R. 31-37).

²³In this regard, see, McCrary v. Metropolitan Life Ins. Co., 408 F.Supp. 414 (D.C. Mass. 1976).

²⁴Although the lone case of Banks v. Teletype Corp., 563 F.Supp. 1358 (E.D. Ark.; 1973), has erroneously held that Zipes, supra, is no authority in cases involving the 90-day

"... although the [Supreme Court and the old Fifth Circuit] have not had occasion to address the nature of each of Title VII's pre-conditions, we discern no rational basis for treating those that have not been considered from those that implicitly or-explicitly have been held not to be jurisdictional." 678 F.2d at 1009.

Similarly, in Fouch v. Jekyll Island-State Park Authority, 713 F.2d 518 (11th Cir., 1983), that appellate court went on to hold that, "[t]herefore, Jackson mandates that all Title VII requirements to suit are henceforth to be reviewed as conditions precedent to suit rather than as jurisdictional requirements." (Emphasis supplied). (Citing, Zipes, supra), 713 F.2d at 1525.²⁵ Accord; Watson v. Republic Airlines, Inc., 553 F.Supp. 939, 942 (N.D. Ga., 1982; Scarlett v. Seaboard Coast Line Railroad Co., 676 F.2d 1043, 1049 (5th Cir. 1982); Pinkard v. Pullman-Standard, 678 F.2d 1211, 1217-18 (5th Cir. 1982).²⁶

It should be noted that at no time prior to the district court's sua sponte decision to dismiss respondent's Title

limitation period of 42 U.S.C. §2000e-5(f)(1), that same decision does expressly recognize the principle of equitable tolling. 563 F.Supp. at 1360.

²⁵Fouch, supra, involved the failure on the part of the would-be plaintiff to obtain a right-to-sue letter from the state attorney general and held that such failure was not jurisdictionally fatal to that litigant's federal Title VII claims. Cf., Garrison v. International Paper Co., 714 F.2d 757 (8th Cir. 1983) (dicta).

²⁶Although not directly relevant to the issue at bar, the federal courts, using the same type of equitable notions,

VII claims for want of jurisdiction, did petitioner ever raise such issue itself, make any noises to the effect that it had been prejudiced by the manner in which respondent initiated her federal lawsuit, or claim that any condition precedent to filing that lawsuit were not met. In any event, the factual chronology as to what transpired in conjunction with filing her Title VII claims, the precise dates of the various filings which she made (both pro se and thereafter with the assistance of counsel), and the ensuing procedural events, are not in dispute between the parties. The findings of the Magistrate in his recommendation, those of the district court judge in his sua sponte dismissal of the Title VII claims, and those of the Eleventh Circuit reversing that dismissal, are likewise undisputed. Therefore, this Court, if it accepts review by way of the petition for writ of certiorari, is in a position to find as a matter of law whether or not there was failure on the part of respondent to timely file in terms of conditions precedent to her Title VII lawsuit and, of course, whether or not Zipes obviates any jurisdictional issues.

have uniformly held that the failure or refusal of the EEOC to issue a right-to-sue letter does not, under 42 U.S.C. §2000e-5(f)(1), preclude a Title VII litigant from his day in court. E.g., Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091 (4th Cir., 1982).

B. Where the would-be Title VII litigant files nothing with the Court within the 90-day period, equitable tolling will not obtain:

Actual notice to the defendant of the commencement of a federal action within the 90-day period is the touchstone. Cox v. Consolidated Rail Corp., 557 F.Supp. 1261 (D.C. D.C. 1983), Therefore, and quite predictably, federal courts have generally refused to apply equitable considerations where the would-be Title VII litigant has done nothing in terms of commencing such a lawsuit within the 90-day period.²⁷

However, even the foregoing line of authority has been rejected by some federal courts based upon the remedial effect of Title VII and the liberal underpinnings of congressional intent in enacting the Civil Rights Act of

²⁷See, Lewis v. Connors Steel Co., 673 F.2d 1240 (11th Cir. 1982) (possibility of right-to-sue letter being sent to outdated address insufficient); Bell v. Eagle Motor Lines, 693 F.2d 1086 (11th Cir. 1982) (plaintiff allegedly out of town when right-to-sue letter received by wife not sufficient); Law v. Hercules, 713 F.2d 691 (11th Cir. 1983) (right-to-sue letter picked up by plaintiff's minor son and left on kitchen table not sufficient); Rice v. New England College, 676 F.2d 9 (1st Cir. 1982) (plaintiff mailed complaint on 88th day which was received by Clerk of Court on 91st day not sufficient); David v. Sears, Roebuck & Co., 29 F.R.P. 1341 (D.C. Mass. 1982) (mere fact that complaint filed one day late creates no equitable consideration); Aljadir v. University of Pennsylvania, 547 F.Supp. 667 (E.D. Pa. 1982) (plaintiff's alleged receipt of incorrect instructions from Clerk's Office did not warrant tolling of 90-day statute); Harper v. Burges, 701 F.2d 29 (4th Cir. 1983) (plaintiff's failure to notify EEOC of change of her address precluded equitable tolling of 90-day statute); Davis v. Sears, Roebuck & Co., 708 F.2d 862 (1st Cir. 1983) (distance between plaintiff's home and the courthouse insufficient to cause equitable tolling).

Of course, this Court, if it does accept review of this case, would not have to extend its holding so as to allow for equitable tolling where nothing is done by the would-be Title VII litigant, however, such a holding would in no way do violence to Zipes, supra, or any other precedent of this Court. Regardless, respondent, as set forth in her statement of facts herein, infra, did get herself to the federal courthouse in the Middle District of Alabama well prior to the expiration of the 90-day period, thereby causing notice in fact of her complaint to be served upon petitioner and petitioner's counsel. Cox, supra.

C. Where the would-be Title VII litigant files something with the Court within the 90-day period so as to give the defendant actual notice that the matter is being judicially pursued, equitable tolling will obtain:

Petitioner will be able to cite to this Court no federal post-Zipes decision running counter to the above proposition of law.

As noted, actual notice of the filing of a Title VII action within the 90-day period clearly appears to be the test. Equitable tolling obtains regardless of whether the substance of what is filed comports with the niceties of

²⁸See, Thomas v. KATV Channel 7, 692 F.2d 548 (8th Cir. 1982) (receipt of right-to-sue letter by plaintiff's attorney did not constitute receipt by plaintiff and equitable tolling should be allowed); Decker v.

federal pleading so long as the defendant is not prejudiced, a factor not involved in the case at bar. Cox v. Consolidated Rail Corp., supra. In Cox, supra, the plaintiff's attorney had filed a complaint within the 90-day period which clearly did not comport with the district court's local rules. In fact, the Clerk rejected the complaint which was thereafter refiled in the correct form, but six days after the running of the 90-day statute. The court summarily allowed for equitable tolling.

From the time that respondent first filed her complaint with the Equal Employment Opportunity Commission, petitioner was placed on notice that she was pursuing a race discrimination claim against it. Moreover, within days of her filing of the ensuing right-to-sue letter (based upon the original EEOC complaint) with the federal court of the Middle District of Alabama, she reapprised and noticed petitioner with great specificity that she was pursuing a claim under Title VII for race discrimination.²⁹ Petitioner, therefore, was in no way surprised, prejudiced, or otherwise harmed by the technical failure to have a Rule

Anheuser-Busch, 558 F.Supp. 445 (M.D. Fla. 1983) (same result); Billings v. Wichita State University, 557 F.Supp. 1348 (D.C. Kan. 1983) (unclaimed right-to-sue letter sent certified mail and to which plaintiff claimed no knowledge did not bar Title VII lawsuit filed 14 months later).

²⁹See, Information Sheet For Appointment of Counsel (filed May 6, 1981) (R. 22-23), Amended Complaint (filed June 9, 1981) (R. 41-45).

8-type complaint filed against it prior to the expiration of the 90-day statutory period.

CONCLUSION

With this, it can hardly be said that the federal courts, "are groping for an equitable rule by which to interpret the Title VII statute of limitations." (Petitioner's Brief at pg. 7). To the contrary, this area of the law amid the morass of Title VII, enjoys uncommon clarity attributable primarily to this Court's holding in Zipes, supra.

Able counsel for petitioner has advanced the notion that there exists some practical distinction between the initial filing of a complaint with the Equal Employment Opportunity Commission and the filing of a complaint in federal court -- the former being a, "layman's action unassisted and unencouraged"; the latter conditioned upon the issuance of the right-to-sue letter. (Petitioner's Brief at pg. 8). Experience and an understanding of the practical machinations and the subtle nuances of Title VII actions (at all stages) renders such a distinction more apparent than real.

Drafting an EEOC complaint now requires legal acumen well beyond the ken of the layperson victimized by acts of discrimination.³⁰ There is no basis upon which to argue

³⁰The 180-day limitation must be adhered, Zipes, supra;

or suggest that a claim of discrimination filed with the EEOC is any less serious or of lesser import than the one thereafter pursued in a federal court, if unresolved by the EEOC.³¹

Likewise, there is no basis to argue or suggest that a licensed attorney and member of the Federal Bar would be any less deliberative in filing a Title VII claim in federal court than in filing an EEOC complaint. One would hope that such attorney would engage in far greater deliberation, interviewing the client(s) and witnesses, analyzing the file generated by the EEOC and the generally scant empirical

the scope of the EEOC claim will limit the scope of an ensuing lawsuit, Sanchez v. Standard Brands, 431 F.2d 455, 466 (5th Cir. 1970); the plaintiff must be aware of the sometimes subtle distinction between discrimination of a continuing nature and which is not, Guardian's Association of the New York City Police Dep. v. Civil Service Commission, 633 F.2d 232 (2nd Cir. 1980), aff'd 51 U.S.L.W. 5105; the plaintiff must be aware of the manner in which other time periods are calculated, Delaware State College v. Ricks, U.S. ___, 101 S.Ct. 498, ___ L.Ed.2d ___ (1980); the plaintiff must be aware of res judicata/collateral estoppel effect on waivers and conciliation agreements, Williamson v. Bethlehem Steel Corp., 418 F.2d 1201 (2nd Cir. 1970), cert. den. 411 U.S. 911; the claimant must carefully identify the entities and parties against whom the charges are brought, Williams v. General Foods Corp., 492 F.2d 397, 404-405 (7th Cir. 1974); the claimant must be aware of different procedures and time-lines in states with deferral agencies, Mohasco Corp. v. Silver, 447 U.S. 708 (1980); and the plaintiff must be aware of complicated considerations if subsequent litigation is to be pursued as a class action, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); to name only a few.

³¹Indeed, the sanctions of an award of attorney's fees against a non-prevailing plaintiff for frivolous or meritless claims could reasonably be expected to apply to such claims made in either a federal court or with the EEOC. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct.

data in the possession of his client, and, of course, researching the rapidly evolving case law in an attempt to divine whether his client can climb the precipitous and lofty mountain -- the Title VII prima facie case.

In this regard, it is not at all atypical for the attorney to meet his Title VII client at the eleventh hour, just before that client's right-to-sue letter expires. These clients, in the main, have pursued their claims before the EEOC pro se and may thereafter have presented themselves to a federal clerk's office for advice and/or to attempt to commence their Title VII action. Respondent fits this mold of the typical Title VII litigant. The principle of equitable tolling causes benefits to inure to all parties concerned: The would-be plaintiff is given an opportunity to stop the relatively short-fused clock from running. The litigant's attorney is afforded the opportunity to carefully deliberate whether or not a viable Title VII claim is presented before racing to the courthouse. The defendant receives renewed notice that the plaintiff is still dissatisfied with the resolution of his claim and, more importantly, is spared ill-advised, hastily conceived lawsuits against him. The federal district court clerk and the judge to whom the case is assigned are afforded time in

which to honor valid requests for appointment of counsel to indigent litigant.³²

Under the facts, most certainly respondent's filing of her right-to-sue letter and request for a court-appointed counsel should be deemed to have tolled the 90-day filing requirement of 42 U.S.C. §2000e-5(f)(1). Further, petitioner has waived and is now estopped from objecting to any defect in filing or attendant prejudice thereby caused.

Based upon this and the foregoing points and authorities of law, respondent respectfully urges this Honorable Court to deny the petition for writ of certiorari or, if granted, affirm the ruling of the Eleventh Circuit so that respondent might have the day in court to which she is legally entitled.

Respectfully submitted,



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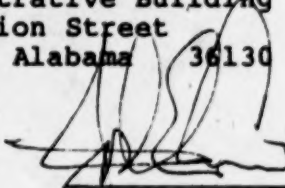
³²Of course, the court, as did the district court below, can (and should) enter orders requiring, inter alia, that the plaintiff or his attorney file a formal complaint within a reasonable time to insure no prejudice inures to the defendant(s).

CERTIFICATE OF SERVICE

I, Joseph E. Carr, IV, do hereby certify that on this the 20th day of October, 1983, I served a copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT upon opposing counsel by depositing same in the United States Mail, postage prepaid, and addressed as follows:

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